CHAN SOW YING

v.

PACIFIC & ORIENTAL UNDERWRITERS (M) SDN. BHD.

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[CIVIL APPEAL NO. 4 OF 1984]
9 JULY 1988

CIVIL PROCEDURE: *Road traffic claim - Notice of proceedings - Expiry of first writ - Fresh writ and notice filed - Served out of time - Question of valid and sufficient notice - Road Traffic Ordinance 1958, s. 80(2)(a).*

As a result of injuries suffered in a car accident the plaintiff, C, instituted a claim for damages against the driver of the car and a notice of commencement proceedings dated 20 June 1974 (the first notice) was issued and sent to the driver and his insurers; the writ could not be served on the defendant and it expired through lapse of time.

C's solicitors subsequently filed a fresh writ of summons and issued a notice of commencement of proceedings in 1977 (the second notice); this notice was received by the defendant more than seven days after the commencement of the second writ.

It was the defendant's contention that this second notice was not a valid notice as it was received by the defendant more than seven days after commencement of the 1977 proceedings. It was also argued that the first notice was not a valid notice in relation to the 1977 proceedings and for the purposes of s. 80(2)(a) of the Road Traffic Ordinance 1958 (the Ordinance).

The learned Magistrate dismissed C's application as she found that the defendant had a good defence. Hence this appeal.

The question to be decided in this appeal was which of the two notices could legally be considered valid and sufficient notice for the purposes of the second suit in order to satisfy the requirement under s. 80(2)(a) of the Ordinance.

Held:

[1] On a reading of s. 80(2)(a) of the Ordinance, the object of the notice would be to give the insurer sufficient notice to put up a defence if necessary before he is made to pay. If a notice were held to be good for all time this would entail the defendant spending time and money to prepare a defence when ultimately it is discovered that the plaintiff wishes not to proceed with the action.

[2] It is good policy to maintain that the first notice is only good for the first writ of summons and once its life expires the first notice must also go with it. Since the first writ has ceased to be in force, the second writ must be taken as a fresh writ and it cannot be treated otherwise.

[3] There was no mention in the fresh writ and notice that there had been another notice issued earlier. The inference is that the second notice was meant to be received as a proper notice of the 1977 proceedings.

[Appeal dismissed.]

Cases referred to:

Battersby & Ors. v. Anglo-American Oil Co. Ltd. & Ors [1944] 1 KB 23
Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd. [1984] 1 CLJ (Rep) 363
Rohani bte. Muda v. Mohamad bin Awang & Anor. (Peoples Insurance Company of Malaya Ltd. Intervening) [1979] 1 MLJ 25
Lowenthal v. Vanhoute & Anor. [1947] 1 All ER 166

Legislation referred to:

Road Traffic Ordinance 1958 s. 80(2)(a)
Rules of Supreme Court [UK] O. 8 r. 1(1)

For the Plaintiff/Appellant - S.M. Appaduray; M/s. Ten Appaduray & Wong
For the Defendant/Respondent - Harold Leonard Wrigglesworth; M/s. Wrigglesworth & Co.

[**Editor's note:** The plaintiff's appeal to the Supreme Court *vide* Supreme Court Civil Appeal No. 202/88 was dismissed on 16 January 1989]

JUDGMENT

Lamin Mohd. Yunus J:

This is an appeal by the plaintiff against the decision of the learned Magistrate dismissing her application to strike out the defendant's defence and to enter summary judgment for the sum of RM8,000. The facts of this case were briefly that on 4 August 1972 the plaintiff travelled as a passenger in a motor car bearing registration No. CA 4220 and the said car collided with another motor vehicle driven by one Sari bin Mat Tahar. The plaintiff through her solicitors commenced proceedings against Sari and a notice of proceedings dated 20 June 1974 was issued and sent by A.R. Register to both Sari and his insurers. A civil suit was instituted against Sari in the High Court of Kuantan *vide* Kuantan High Court Civil Suit No. 121 of 1975. But the writ could not be served on the defendant and it expired through lapse of time.

Plaintiff's solicitors subsequently filed a fresh writ of summons *vide* Kuantan High Court Civil Suit No. 76 of 1977 and issued a notice of commencement of proceedings dated 16 March 1977 to the defendants. The learned Counsel for the plaintiff contended before the learned Magistrate that the first notice served on the defendant was a valid and sufficient notice. Learned Counsel for the defendant however maintained that a fresh action presupposes a fresh notice. Hence the first notice of proceedings dated 20 June 1974 could not be a valid notice in respect of Kuantan High Court Civil Suit No. 76 of 1977. However, the second notice dated 16 March 1977 was received by the defendant more than 7 days after the commencement of the Kuantan High Court Civil Suit No. 76 of 1977 which was dated 8 March 1977. This second notice was therefore not a valid notice for the purposes of s. 80(2)(a) of the Road Traffic Ordinance 1958. Being so the case, the defendant was not liable to pay the judgment sum obtained in Kuantan High Court civil suit nos. 75 and 76 of 1977. The learned Magistrate however dismissed plaintiff's application as she found that the defendant had a good defence.

Now s. 80(2)(a) of the Road Traffic Ordinance reads:

> (2) No sum shall be payable by an insurer under the foregoing provisions of this section:
>
> (a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings; or

The question to be decided in this appeal is which of the two notices that could legally be considered as valid and sufficient notice for the purposes of Kuantan High Court Civil Suit No. 76 of 1977 in order to satisfy the requirement under s. 80(2)(a) of the Road Traffic Ordinance 1958. Counsel for the plaintiff/appellant urged this Court to treat the first notice dated 20 June 1974 as valid and sufficient notice on the ground that the first writ, because it had lapsed for lack of service, would be in the same position as one that had never been issued and he cited Lord Goddard in the case of *Battersby & Ors. v. Anglo-American Oil Co. Ltd. & Ors.* [1944] 1 KB 23 at p. 29:

> If the writ has ceased to be in force the position is the same as if it had never been issued.

I do not think this case is sufficiently persuasive or even relevant as it did not deal with the question of notice as in our case. What happened in the *Battersby's* case was that a writ was issued under the Fatal Accidents Act 1846 but it was not served within the twelve months as required by Rules of Supreme Court O. 8 r. 1(1). Fifteen months later applications for renewal of the writ were made but leave was refused. On appeal leave was granted to renew the writ for six months and on expiration of that period a further six months subject to any application to set aside the writ. Some 8 months afterwards the writ was served on the defendant who entered conditional appearance. Almost immediately an application to set aside the writ was made to Master Baker who ordered that the writ and the service thereof be set aside on the ground that at the time of the renewal of the writ the plaintiff's cause of action under the Fatal Accidents Act 1846 had expired. The plaintiff appealed and his appeal was allowed with the order that the earlier order granting to renew the writ should stand. An appeal against this order was made to the Court of Appeal which allowed the appeal. Lord Goddard in the cause of deliberation said:

> (p.29) As we have just said, there is a consistent line of authority that the Court will not extend the time in such cases so as to deprive the defendant of the benefit of the statute.
>
> (p.32) To grant the renewal would therefore be to disregard the statute, which no Court has a right to do merely because its operation works hardship in a particular case.

As I have said earlier this case did not concern itself with the question of notice but with the question of limitation period under the Act. Counsel for the plaintiff/appellant in the present case also submitted that the second notice could be treated as "*ex abundanti cautela*" and cited the case of *Syarikat Kewangan Melayu Raya v. Malayan Banking Berhad* [1984] 1 CLJ (Rep) 363.

Again I must say that the maxim "*ex abundanti cautela*" as applied in that case, cannot, with respect, be applied to our present case. In the case cited the two notices in Form 16D were served in accordance with the requirements of s. 254 of the National Land Code separately dated with fifteen days in between and they were intended for one transaction namely a default or failure to remedy a breach of a provision in a charge under the National Land Code, that is, failure to pay the sum of RM2,840,826.94 which resulted in a foreclosure proceeding in respect of the land charged. Whereas in our present case there are two transactions namely the first writ of summons that could not be served and expired through lapse of time and the second writ of summons 3 years afterwards *vide* Kuantan High Court Civil Suit No. 76 of 1977.

I was equally unable to be persuaded by the submission of the learned Counsel for the plaintiff/appellant on the case of *Rohani bt. Muda v. Mohamed bin Awang & Anor. (Peoples Insurance Company of Malaya Ltd. Intervening)* [1979] 1 MLJ 25. Similarly in

the case of *Lowenthal v. Vanhoute & Anor*. [1947] 1 All ER 166 on which the learned Counsel for the plaintiff/appellant attempted to rely. In that case Denning LJ as he then was decided that:

> Where a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after the expiry of the first notice.

I do not see how this statement of the law can assist the plaintiff/appellant in his appeal. On the contrary the defendant/respondent may find comfort in it if the second writ of summons is treated as a fresh action. In the present appeal before me there were two writs of summons taken out, one in 1975 and the other in 1977. For each of those actions there was a notice. In the first notice dated 20 June 1974 the third paragraph states:

> Further we are instructed to inform you that all our clients will be instituting a claim for damages.

That claim was then instituted by way of the first writ in 1975. When the life of the writ expired, one can only assume that the intention to institute a claim as conveyed in the said notice had also ceased to exist. Otherwise that intention to file a claim will remain as a reminder or as a threat that a claim will be filed somehow, sometime. It will keep everyone concerned guessing and waiting indefinitely and I do not think that it will be in consonance with good conscience and fair play. If I may add that the object of s. 80(2)(a) of the Road Traffic Ordinance 1958 from the way it is worded is to give the insurer sufficient notice thereby giving him an opportunity to put up a defence if necessary before he is made to pay as adjudged. That would involve consulting his Counsel and interviewing the insured in order to ascertain the true position. If a notice were to remain good for all time notwithstanding the expiry of the writ of summons, then the party supposedly to be liable to pay would have to spend time and money to prepare his defence when in the end it was found unnecessary because the injured party chose not to proceed for reasons best known to himself. So to my mind, it is good policy to maintain that the first notice is only good for the first writ of summons and once its life expires, the first notice must also go with it. Since the first writ has ceased to be in force the second writ must be taken as a fresh writ and it cannot be treated otherwise. The plaintiff/appellant saw it fit to have it served, with a notice accompanying it. There was no mention and not a hint that there has been another notice issued earlier. The second notice was brief and it made direct reference to the suit in hand and the precise provision of the Road Traffic Ordinance 1958. The inference could be no other than the second notice was meant to be received as a proper notice of the proceedings pertaining to the Kuantan High Court Civil Suit No. 76 of 1977, in respect of which summary judgment was obtained.

In the circumstances I therefore dismissed the appeal with costs.

Also found at [1991] 2 CLJ 1504